

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bky. No.: 04-32864
Chapter 7 Case

James Harold Jutz,
Darleen Mary Jutz,
Debtors.

**MEMORANDUM OF LAW IN OPPOSITION TO OBJECTIONS OF
FIRST FEDERAL BANK TO DEBTORS' EXEMPTIONS; NOTICE OF
WITNESSES,
and
ALTERNATIVE REQUEST FOR CERTIFICATION TO MINNESOTA
SUPREME COURT**

First Federal Bank has objected to the debtors' claimed exemptions in real estate, rent, and in rights to payment for delivery of crop. For the reasons stated in this memorandum, the objections should be overruled and the exemptions upheld.

If necessary, the debtors may call either or both of themselves as witnesses at the hearing of this matter.

With some exceptions, the bank confuses exemption issues under 11 U.S.C. § 522 and FRBP 4003(b) and (d), on the one hand, and on the other hand state property law and an adversary proceeding under FRBP 7001(2) to determine the extend of an interest in property. The former, exemption issues, generally arise between the individual debtors and the estate, although on occasion a creditor (unlike the bank in this case) will challenge them on various specific grounds in order to minimize § 522(f) lien avoidance or maximize the pro rata dividend. The latter, disputes over property interests, are resolved in state court or via adversary litigation in bankruptcy court.

The bank cites *Georgens v. FDIC*, 406 N.W.2d 95. 99 (Minn. App. 1987) for the proposition that security interests are inconsistent with exemption claims. As the opinion indicates, the exemption issue in *Georgens* was an afterthought. The Court of Appeals, having

held that a wife had impliedly authorized her husband to pledge farm assets as collateral, held that a statutory form of exemption waiver was not necessary from the wife. Although a security interest may grant the secured creditor an interest superior to the exemption claim, it does not eliminate the exemption claim itself. The present bankruptcy exemption claims are asserted against the creditor world in general, and the presence or absence of a security interest does not affect the exemption claim itself.

1. Homestead vs. constructive trust. The debtor's exemption claim does not prejudice the bank's claims in the same real estate, whatever their merits.¹ The practical effect of the bank's adverse claim is to depress the value of the property to the debtors, but not to eliminate their homestead rights. The bank's claim operates similarly to a disputed mortgage – either it exists or doesn't exist, but the debtors have a valid homestead claim in the remaining equity. In this instance, the bank does not raise a well-founded objection to exemptions, and therefore the objection should be overruled.

2. Exhibit B (option) property.² The Exhibit B property is 29 acres recently separated from the northeast corner of what otherwise would be a square 160-acre homestead. The debtors have retained an option to repurchase this property. The debtors are entitled to exempt “any interest” in the property. Minn. Stat. § 510.04. The debtors need not occupy every square inch of the property; it is sufficient that they occupy the dwelling, in which case the land (up to 160 acres) “upon which [the dwelling] it is situated” is exempt. *Id.* § 510.01.

The homestead exemption is given a liberal, broad construction. *Cargill, Inc. v. Hedge*, 358 N.W.2d 490, 492 (Minn. App. 1984); *aff'd*, 375 N.W.2d 477 (Minn. 1985). Ownership and occupancy of a dwelling is sufficient to confer homestead status on adjoining acreage, even if the

¹ Reams of pleadings from the bank thus far have provided no specifics as to the bank's constructive trust claim.

² This property is listed on the Debtor's Schedule A, Attachment A-2, and is claimed exempt on Schedule C.

debtor's interest in the adjoining acreage is not a current possessory interest. *Denzer v. Prendergast*, 267 Minn. 212, 126 N.W.2d 440 (1964); *In re Stenzel*, 301 F.3d 945 (8th Cir. 2002). Not only can land be rented out and nevertheless homesteaded, but the rents themselves are exempt under the homestead statute. *Wilson v. First Nat. Bank of Mankato*, 239 Minn. 550, 60 N.W.2d 69 (1953).

The 29 acres were sold at an approximation (without a formal appraisal) of fair market value. The optionor has to pay that amount back with interest in order to recover the property. Therefore, it is doubtful whether the option would be of significant value to the estate, in any event. The option is a surviving term of the purchase agreement (erroneously referring to 25 instead of 29 acres), paragraph 25.B.1., a true copy of which is attached to this memorandum.

3. Asserted crop security interest. As with the constructive trust issue addressed above, the bank's claim in the crops, whatever its merits, does not preclude an exemption claim by the debtors. The bank does not raise a valid exemption issue.

The debtors and bank may dispute whether the bank has a security interest in 2003 crops. The bank had a security interest in crops of Jutz Farms, Inc., a family farm corporation, but due to lack of financing and other factors the debtors did not operate in 2003 under the corporation. As farm program and other records and testimony would show (in properly commenced adversary or state court litigation), the debtors personally produced the 2003 crop, and the bank has no interest in it or its proceeds. That dispute, should the bank properly raise it, is a matter for another day.

4. Claimed security interest in rents. Once again, a claimed security interest does not preclude an exemption claim. Security interests aside, the homestead exemption extends to rentals. *Wilson v. First Nat. Bank of Mankato*, *supra*.

At such time as the matter of a security interest in rents is properly before any court, it will suffice for the debtors to cite Minn. Stat. § 559.17 subd 3(1), which nullifies a security interest in rents when the rented land is "entirely homesteaded as agricultural property."

For these reasons, the Court should overrule the bank's objections to exemptions, and uphold the exemptions.

Alternative request for certification to Minnesota Supreme Court

Minnesota Statutes § 480.065 subd. 3 provides that:

The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.

In deciding whether to certify the question, the Court should be guided by the considerations set forth in *Hatfield v. Bishop Clarkson Memorial Hospital*, 701 F.2d 1266, 1267 (8th Cir. 1983):

The United States Supreme Court in *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974) held that use of a state's certification procedure "rests in the sound discretion of the federal court." The Court determined that although a federal court was not required to resort to certification, certification was "particularly appropriate in view of the novelty of the question" and the unsettled nature of state law. *Id.* at 391, 94 S.Ct. at 1744. See also *Clay v. Sun Insurance Office*, 363 U.S. 207, 212, 80 S.Ct. 1222, 1225, 4 L.Ed.2d 1170 (1960). Because of the unsettled nature of Nebraska law on this issue and because a determination of this issue could be dispositive of this case, the issue is appropriate for certification to the Nebraska Supreme Court. *Elkins v. Moreno*, 435 U.S. 647, 668, 98 S.Ct. 1338, 1350, 55 L.Ed.2d 614 (1978).

These considerations strongly militate in favor of certifying the present question in lieu of denying the exemption. Sustaining the objections either under a narrowed construction, or holding that a security interest is a general waiver of exemptions against all creditors, would constitute a major departure from the historical construction of the Minnesota exemption law.³ Therefore, debtors make this alternative request for certification, and for leave to file a proposed certification order when directed to do so by this Court.

³ Nevertheless, the undersigned believes this Court is amply competent to take a first run at the issue. However, a request for certification now is necessary in order to avoid waiver of this procedural option. *Rural Water System v. City of Sioux Center*, 202 F.3d 1035, 1037 n.6 (8th Cir. 2000).

Respectfully submitted,

/e/ Kurt M. Anderson

Kurt M. Anderson # 2148

Attorney for Debtors

P.O. Box 2434

Minneapolis, Minnesota 55402-0434

(612) 333-3185

VERIFICATION

We hereby declare under penalty of perjury that we have read the foregoing memorandum response to objection to exemptions; and that the facts stated therein are true and correct.

Executed on: _____

Executed on: _____

Respectfully submitted,

/s/ Kurt M. Anderson
Kurt M. Anderson # 2148
Attorney for Debtors
P.O. Box 2434
Minneapolis, Minnesota 55402-0434
(612) 333-3185

VERIFICATION

We hereby declare under penalty of perjury that we have read the foregoing memorandum response to objection to exemptions; and that the facts stated therein are true and correct.

Executed on: 8-16-04

James Harold Jutz

Executed on: 8-16-04

Doreen May Jutz

Declaration of Service via Facsimile

Kurt M. Anderson respectfully declares to that on August 17, 2004, he served the following items:

Response of James and Darleen Jutz to First Federal objection to exemptions
This proof of service

Via facsimile on the following individuals or entities:

Andrew Moratzka	612-305-1414
Paul Bucher, Trustee	507-288-9342
United States Trustee	612-664-5516

VERIFICATION

I hereby declare under penalty of perjury that I have read the foregoing declaration; and that the facts stated therein are true and correct.

Executed on: August 17, 2004 /s/ Kurt M. Anderson